

Parnolfi (Migration) [2018] AATA 554 (7 March 2018)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Giuseppina Parnolfi

CASE NUMBER: 1616970

DIBP REFERENCE(S): BCC2015/2110628

MEMBERS: Simone Burford (Presiding)
Michelle East

DATE: 7 March 2018

PLACE OF DECISION: Perth

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211(2) of Schedule 2 to the Regulations
- cl.820.221 of Schedule 2 to the Regulations
- r.2.03A
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- Statement made on 07 March 2018 at 3:04pm

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 – Co-habit with sponsor's sister and brother-in-law – Joint finances – Joint bank account – sponsor has financially supports the applicant – Work at the sponsor's restaurant together – Close relationship with sponsor's family – Genuine relationship

LEGISLATION

Migration Act 1958, ss 5CB, 65

Migration Regulations 1994, rr 1.09A, 2.03A Schedule 2 cl 820.211

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 12 October 2016 to refuse to grant the applicant, Ms Giuseppina Parnolfi, a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 23 July 2015 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2) because the delegate was not satisfied that parties were in a genuine de facto relationship for the 12 month period prior to the date of the visa application.
4. The applicant appeared before the Tribunal on 12 February 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's sponsor, Mr Kambiz Givar. Mr Houman Baghari, the sponsor's brother-in-law and Ms Marianna Parnolfi, the applicant's sister were also available to give evidence in person at the hearing. Mr Mark Victor Causo, a friend of the parties was available by telephone. However, the Tribunal did not regard it as necessary to take evidence from these witnesses.
5. The applicant was represented in relation to the review by her registered migration agent, Mr Raymond Tan.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the parties were in a genuine de facto relationship for the 12 months prior to date of the visa application that is for 12 months prior to 23 July 2015.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen.

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

9. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

10. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
11. The Tribunal has before it the Department's file relating to the applicant. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it including material submitted by the parties.
12. The parties' oral evidence confirms that they first met in November 2013 when the applicant started work at a restaurant where the sponsor was the assistant manager. The parties' oral evidence confirmed that the applicant was staying at the home of the sponsor in Waterford from some time in March 2014 when the sponsor opened his own restaurant. The parties provided oral evidence that they committed to moving in together at this time and declared their relationship to friends at the opening of the sponsor's restaurant on 20 March 2014.
13. The parties' oral evidence confirmed that they moved in together formally in April 2014. From April 2014 to October 2015 they resided in East Perth with the sponsor's sister and brother-in-law. From October 2015 to April 2017 they resided in a home owned by the sponsor in Huntingdale, again with the sponsor's sister and brother-in-law. Since April 2017 they have resided in East Perth following the sale of the Huntingdale property to the sponsor's brother-in-law.
14. The Tribunal has had regard to the evidence provided relating to the financial aspects of the relationship including joint ownership of assets and joint liabilities, the extent of pooling of financial resources, any legal obligations owed by the other party and any sharing of the day-to-day household expenses.
15. The parties provided financial information which reflects their financial circumstances. This information included financial statements for a joint account opened on 5 July 2016. The parties' evidence is that the applicant is the main user of this account and her salary is paid into the account directly. The parties also submitted copies of bank statements for an account in the applicant's name and an account in the sponsor's name. The applicant's evidence is that she closed her personal account when the joint account was opened. The parties have also provided evidence that the sponsor owns and runs a restaurant business for which he maintains separate business accounts. The Tribunal accepts this evidence and it is supported by the bank statements provided.
16. The parties' evidence is that the sponsor has met, and continues to meet, most of the household expenditures for the applicant from his personal account. The sponsor's oral evidence was that it is consistent with his cultural upbringing that he bears financial responsibility for supporting his partner. The parties' oral evidence was that significant expenses, such as the applicant's medical and surgical expenses, were met by the sponsor. This also reflects the applicant's limited earning capacity early in the relationship and the fact she now works with him supporting his restaurant business. The sponsor gave oral evidence that he regarded his financial assets as 'joint' even if they were in his name as this was consistent with his upbringing. The parties have also provided sworn evidence that maintaining separate bank accounts was preferable during the earlier stages of the relationship given the business obligations of the sponsor in owning and managing his restaurant. The parties' evidence is that they have increasingly moved to using the joint account to manage household expenditures. The Tribunal accepts this evidence and it is supported by the bank statements provided.
17. The parties' evidence is that the mortgage payments and rates payments on the property at Huntingdale, which was owned by the sponsor, were paid from an account in the sponsor's

name. Rental payments on their prior residence in East Perth were also generally paid from this account. However, the applicant's evidence is that responsibility for the rent was shared among the 4 residents of the flat and she paid the equivalent of one week of rent per month. This evidence is supported by copies of the bank statements for the sponsor's account and by a letter from the landlord which has been provided to the Tribunal. Rent for the current address in East Perth is paid from the parties' joint account.

18. The parties provided copies of rates and strata fee notices and power and water bills for the Huntingdale address. These are in the sponsor's name. Several of these are addressed to the sponsor to an address in East Perth which the parties' submit is the location of the sponsor's business.
19. The bank statements provided indicate payments consistent with household expenditures being met from the joint account including rent, groceries, health insurance, telephone and internet and subscription services. The parties gave evidence that their most significant joint expense was rent. In oral evidence the parties maintained that they have very few living costs outside the business as most meals are eaten there and their working hours leave little time for activity outside the restaurant. The Tribunal accepts this evidence.
20. The evidence supports the parties' contention that the sponsor has financially supported the applicant during the relationship. The Tribunal accepts the parties' evidence that the financial arrangements reflect both their cultural beliefs and the relative financial position of the parties. The Tribunal is satisfied based on the evidence provided that the parties' financial arrangements are such that would indicate a genuine de facto relationship and have been so since April 2014.
21. The Tribunal has had regard to the evidence as to the nature of the household including the parties' living arrangements and any sharing of housework.
22. The parties have provided consistent evidence that they have lived together since April 2014. They do not have any children. Sufficient documentary evidence has been provided to support the parties' contention that they have shared an address since April 2014. The applicant's evidence is that she moved out of her prior residence in March 2014 following a decision to move in with the sponsor. She lived briefly at the Waterford address with the sponsor, his brother-in-law and sister and his mother who was visiting from Iran at the time. The Tribunal accepts this evidence which is supported by sworn testimony and bank statements evidencing the refunding of bond monies to the applicant in April 2014 and contributions for rent commencing in April 2014.
23. The parties' evidence is that they shared their flat in East Perth with the sponsor's sister and brother-in-law. The flat was leased in the name of the sponsor and his brother-in-law. Copies of the lease were provided. They also shared the Huntingdale address with the sponsor's sister and brother-in-law. That property was owned by the sponsor. Rates notices and strata fee notices for this property were provided. The parties' most recent address at in East Perth is leased in both of their names. A copy of this lease was provided. According to the parties' oral evidence, this address is not shared with the sponsor's sister and brother-in-law.
24. The parties' evidence indicates that while they lived with the sponsor's sister and brother-in-law they shared household duties. The parties have both submitted that due to the long hours required to build the restaurant business most of their time is spent at the restaurant and most of their meals are eaten there. When at home the sponsor does most of the cooking and the applicant and the sponsor's sister-in-law did most of the cleaning. In the current address duties are split between the applicant and sponsor when they are not at the restaurant.

25. While the applicant was not named on the lease at either the first East Perth or Huntingdale addresses the applicant provided bank statements and accounts addressed to her at those addresses during the relevant periods. She provided certified copies of her driver's licence bearing the Huntingdale address.
26. The Tribunal is satisfied on the sworn evidence that the nature of the parties' household is such that would indicate a genuine de facto relationship and has been so since the parties moved in together in April 2014.
27. The Tribunal has had regard to the evidence provided as to whether the parties represent themselves to others as being in a genuine de facto relationship, the opinion of the parties' friends and acquaintances about the nature of the relationship and any basis on which the parties plan to undertake joint social activities.
28. The parties have provided supporting material including photographs in group settings and engagements, statements from friends and family and correspondence issued to the parties as a couple. The parties' evidence is that the applicant has met the sponsor's parents during visits to Australia. The sponsor's mother visited Australia from Iran in February 2014 and December 2016 when she met and spent time with the applicant. The sponsor's father visited Australia for 3 months from February 2017 and stayed with the applicant and sponsor. The applicant's sister and fiancé visited for 6 months from October 2016 and spent time with the applicant and sponsor. They also met the sponsor's father during this visit. This evidence is supported by photographs and social media posts provided to the Tribunal.
29. The parties gave oral evidence that the applicant has a close relationship with the sponsor's parents and in particular with the sponsor's mother whom she has met several times and with whom she speaks on a regular basis. This relationship has been facilitated by the applicant learning to speak the sponsor's native language, Farsi. This evidence is supported by evidence of social media posts from the sponsor's mother. The applicant gave oral evidence that she regards the sponsor's sister and brother-in-law as her family.
30. The sponsor is in regular contact with the applicant's mother by phone, assisted by the applicant who is required to translate to her mother's native tongue, Italian. The parties' oral evidence was that they have plans to visit the applicant's mother in Italy in April this year. The applicant's sister and the sponsor's brother-in-law were present to support the parties at the hearing.
31. The parties have provided sworn evidence that their responsibilities building the restaurant business mean that most of their time is spent at the restaurant. This limits their time for outside social activities and means most of their social engagements occur on the restaurant premises. They maintain that they are regularly visited at the restaurant by friends and family. The Tribunal accepts this evidence which is supported by the statements provided to the Tribunal.
32. The evidence portrays a couple who are committed to each other and recognised as being in a genuine and committed relationship by their friends, families and acquaintances. This is consistent with the way the couple presented at the oral hearing. The Tribunal is satisfied based on the supporting documentary evidence that the parties represent themselves socially in such a way as to indicate a genuine de facto partner relationship.
33. The Tribunal has had regard to evidence provided in relation to the nature of the parties' commitment to one another including the duration of the relationship, the length of time they have lived together, the degree of companionship and emotional support they draw from each other, and whether they see the relationship as long-term.

34. The Tribunal is satisfied that the parties first met in November 2013 when the applicant started working at a restaurant where the sponsor worked. The parties commenced a relationship shortly thereafter. The parties made a decision to move in together in March 2014 when the applicant moved out of her rental accommodation and into the flat the sponsor shared with his sister and brother-in-law. They formally moved in together in April 2014. The Tribunal accepts this evidence and it is supported by sworn testimony, bank statements and correspondence provided to the Tribunal.
35. The applicant worked at the sponsors' restaurant for a period following its opening in March 2014 and then moved to work on a farm in Serpentine for a period of three months from July 2014 to October 2014 to comply with her working holiday visa conditions. The applicant then returned to work at the sponsor's restaurant. During the period of physical separation the parties remained in close contact. The parties provided telephone records for this period evidencing consistent contact between the parties. The Tribunal is satisfied the relationship continued during this period.
36. The parties gave evidence that they have supported each other during the establishment of the sponsor's business which has been a financially difficult and stressful time for the parties. The sponsor has provided evidence that the applicant has provided emotional support, stability and encouragement to him as he has established his business and that this support has been pivotal in making the business a success. The sponsor has also supported the applicant when she was suffering from health issues. The sponsor provided evidence that the applicant has studied his native language, Farsi/Persian, to enable her to communicate with his parents. He notes that this commitment to learning his language has been important him and to his parents both practically and as a sign of the applicant's respect for his parents and his culture.
37. The parties have provided oral testimony that they intend to get married in a number of years and to have celebrations in Italy and Iran. They are hoping to establish a restaurant in Tehran following an extended visit to Italy.
38. The parties presented at the hearing as a close and committed couple. The Tribunal is in no doubt as to the genuineness of their relationship. They clearly provide companionship and emotional support to one another and view the relationship as long term.
39. Based on the evidence before it the Tribunal is satisfied that at the time of the application and at the time of the decision the parties have a mutual commitment to a shared life together to the exclusion of all others. The Tribunal finds the parties are in a genuine and continuing relationship and that they live together or not separately and apart on a permanent basis and have done so since April 2014.
40. The Tribunal is also satisfied the parties are not related by family.
41. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB(2) are met at the time the visa application was made.
42. The Tribunal also finds that at the time the application was made the applicant was the de facto partner of a person who is an Australian permanent resident, the applicant was sponsored by that person and the sponsor was not prohibited from being a sponsoring partner under cl.820.211(2B). The Tribunal further finds that at the time the application was lodged the applicant was the holder of a substantive visa.
43. Accordingly, the Tribunal finds the applicant meets cl.820.211(2).

44. The Tribunal finds that the applicant continues to meet the requirements of cl.820.211(2) at the time of the decision. Therefore the applicant also meets the requirements of cl.820.221.

45. Are the additional criteria for a de facto relationship met?

46. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
47. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement.
48. The applicant made her application on 23 July 2015. The evidence, including the parties own statements and oral evidence establishes that the parties first met in November 2013. The Tribunal has found that the parties have had a mutual commitment to a shared life to the exclusion of all others, a genuine and continuing relationship and have lived together, or not separately and apart on a permanent basis from April 2014. The Tribunal is satisfied that the parties were in a de facto relationship for at least the 12 month period ending immediately before the date of application.
49. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.
50. The Tribunal finds the applicant continues to meet the requirements of cl.820.211(2) at the time of this decision as the de facto partner of her sponsor. Therefore the applicant satisfies cl.820.221.
51. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

52. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221 of Schedule 2 to the Regulations
 - r.2.03A

Simone Burford
Member

Michelle East
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.09A DE FACTO PARTNER AND DE FACTO RELATIONSHIP

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).